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April 23, 2024

VIA ELECTRONIC SUBMISSION: <http://www.regulations.gov>

Tina T. Williams
Acting Deputy Director of OFCCP and Director of Policy & Program Development
Office of Federal Contract Compliance Programs
200 Constitution Avenue NW
Room C-3325
Washington, DC 20210

Re: Notice of Proposed Reinstatement of Monthly Employment Utilization Report (CC-257)

Dear Ms. Williams:

On behalf of the Associated General Contractors of America (hereinafter "AGC"), thank you for the opportunity to submit the following comments on the U.S. Department of Labor's (hereinafter "DOL" or "Department") Office of Federal Contract Compliance Programs' (hereinafter "OFCCP") proposed Reinstatement of Monthly Employment Utilization Report (CC-257) as published in the Federal Register on February 23, 2024 (Docket No. OFCCP-2024-0001).

The Associated General Contractors of America is the leading association for the construction industry. AGC represents more than 27,000 firms, including over 6,500 of America's leading general contractors, and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of chapters. These firms, both union and open-shop, engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property. Many of these firms regularly perform construction services for government agencies under contracts covered by the laws enforced by OFCCP. Most are small and closely held businesses.

AGC supports the OFCCP's decision to discontinue the monthly employment utilization report back in 1995. The report would be unnecessarily burdensome on contractors and the agency alike and AGC believes expectations are outdated. For example, the OFCCP is proposing to use Standard Metropolitan Statistical Areas (SMSA) or Economic Areas (EA) in reporting which are outdated and no longer used. Standard definitions of metropolitan areas were first issued in 1949 by the then Bureau of the Budget (predecessor of Office of Management and Budget or OMB), under the designation "standard metropolitan area" (SMA). The term was changed to "standard metropolitan statistical area" (SMSA) in 1959, and to "metropolitan statistical area" (MSA) in 1983. The term "metropolitan area" (MA) was adopted in 1990 and referred collectively to metropolitan statistical

areas, consolidated metropolitan statistical areas, and primary metropolitan statistical areas.¹ While AGC believes this reporting is unnecessary, at the very least we hope the OFCCP will use more accurate and acceptable statistical areas, but also understands their limitations. Even if considering using Metropolitan Statistical Areas, while there are 387 metropolitan statistical areas and 538 micropolitan statistical areas in the United States, there are huge areas too thinly populated to qualify as micropolitan.²

OFCCP has Not Fully Justified the Reinstatement of Discontinued Form CC-257

The OFCCP claims that reinstating Form CC-257 and the collection of information required “will strengthen OFCCP’s enforcement, outreach, and compliance assistance activities, and will help the agency better meet its mission of protecting workers in the construction trades.” AGC supports the protection of workers in the construction trades, however, AGC does not fully understand how this additional and burdensome data will assist OFCCP in its mission. And OFCCP does not fully explain itself either. OFCCP also says that the CC-257 information “can improve its process for neutrally scheduling contractors for compliance evaluations. The reports will provide relevant information that OFCCP can use to inform its scheduling methodology (e.g., identifying which projects are active and providing information on current employee count). In this way, OFCCP can focus its limited resources on compliance evaluations that can have the greatest impact.” Again, OFCCP does not explain specifically how it will use this information to improve upon its processes such as its already established neutral scheduling methodology. OFCCP also admits that it originally discontinued this data collection back in 1995 due to lack of resources and **that it was no longer necessary**. What has changed now? AGC is also highly skeptical that by increasing data collection and processing, even if lucky enough to receive it electronically, that it will improve the agency’s ability to better meet its mission. AGC is rather concerned with the agency’s current capacity limits to meet its mission without any additional burdensome data collections place upon itself and contractors.

Data Privacy and Protection is Not Addressed and of Paramount Concern

In this proposal, OFCCP does not address how this data will be protected from the public. Contractors treat the information about their workforces as confidential commercial information. Broadly, the release of data contained in the CC-257 would potentially provide others with the ability to establish a company’s race and gender employment trends and potentially be able to discern staffing patterns over time. The reports will contain information related to business or trade information, which over time will reveal business operations, such as those that are instrumental for compliance with OFCCP’s regulations.

The reports will contain the number of employees by job category and by MSA location. Disclosure of such information may provide competitors with information on a company’s growth and expansion in emerging markets, commercial viability in existing markets, and potential growth patterns and trends. Likewise, a competitor may glean from the data, a company’s market capacity levels in a given MSA and determine how many human resources it has. This information is confidential commercial information that competitors would not have access to otherwise.

¹ https://www.census.gov/history/www/programs/geography/metropolitan_areas.html

² <https://www.census.gov/programs-surveys/metro-micro/about.html>

Additionally, some companies may potentially have low headcounts in one or more reporting categories in a given MSA, which may reveal the gender and race self-identification chosen by the employees in those categories because of the limited number of people in those categories. The production of individually identifying information violates privacy and confidentiality expectations because these employees did not expect their gender and race/ethnicity information to be shared when they self-identified. Such a violation of privacy has a high likelihood of deterring future participation in voluntary self-identification, frustrating the purpose of such data collection, and potentially subjecting individual companies to risk of non-compliance in future reporting cycles.

Contractors treat their employee demographics including metrics on race and gender as private, non-public, and highly sensitive. Such data is kept confidential and stored with care to maintain confidentiality and provided only to employees on a need-to-know basis for the purpose of carrying out employment duties.

Moreover, the Monthly Employment Utilization report contains employers' employer identification numbers ("EIN"). A businesses' EIN can be used for business banking needs like opening an account or getting a loan. It is also used to acquire state or federal licensing and enables its owner to do business and give financial information to the IRS. No entity is permitted to request the EIN of another entity and the IRS requires that those requesting confirmation of an EIN to be corporate officers, persons with power of attorney, and partners in a partnership. Theft of an entity's EIN is often the first move of a nefarious actor when they intend to steal a corporate identity. The moment someone gets access to an entity's EIN, they can use it to open business banking accounts, corporate credit accounts, and even acquire personal credit. Such criminals can access an entity's mail, claim customer's checks in the name of their victim, deposit money into an account they opened in their victim's name, and make cash withdrawals. Disclosing a company's EIN could subject it to fraud and theft due to the disclosure of its EIN number.

The OFCCP is fully aware of the potential publicization of sensitive employer data through a Freedom of Information Act (FOIA) request, such as the one it has been and continues to battle over the EEO-1 Pay Data that the OFCCP didn't even collect itself. Likewise, the publishing of confidential employee data such as contained in the Monthly Employment Utilization Report obtained through a FOIA request would mean that the information is in the public domain and subject to abuse, misinterpretation and/or misrepresentation. The data would be provided without context, explanation, or background and, as such, a company's employee demographics could be misconstrued, causing disruption to business and confusion among customers, potential employees, and current employees. That disruption and confusion would in turn, harm its economic and business interests. The OFCCP should reconsider the collection of this sensitive data which is destined to become public.

OFCCP Underestimates the Burden on Contractors

The OFCCP estimates the average time per response to this monthly information collection to be one and half hours, with minimal startup costs and a thirty-day implementation period. These estimates and expectations are woefully inadequate and out of touch with reality to assume that contractors have all this data, categorized, connected and easily compiled with just a few mere strokes of the keyboard. Like many things, the reality is much more complicated.

AGC consulted a number of larger, more sophisticated federal contractors with dedicated HR and IT departments to get input on the impact of this data collection might be and the responses were telling. The data requested in the CC-257 is not typically contained in one system, but on different and separate systems that are not married or have the ability to communicate with each other. In most cases contractors will have to dedicate staff to work on potentially a minimum of three to six different systems, to compile and create the data on an entirely new system in-house.

Tracking contracts from award to completion and when they are actively being worked is not a seamless process and would take a significant amount of time to gather. Collecting this data is not as easy as it sounds as the systems that gather who is where and when is not connected to the system that holds the demographic data, which is especially difficult to union contractors whose employees often move in and out of projects. There could be multiple sites in any given month, which would make this more difficult to pull together and track, along with the possibility of individuals being double counted if they were on multiple jobs in one month. Employee classifications can also change as they move from project to project; meaning each monthly submission would require a full re-start of data collection and reporting. The length a worker would have to be present during the reporting period to be considered for the data is not addressed and wouldn't turnover impact the overall numbers and skew the data the OFCCP believes they are seeking?

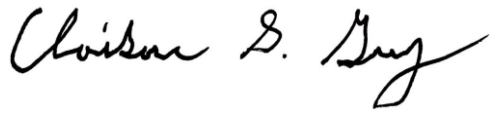
From a contractor HR perspective, it is a struggle to get information on what projects are running where and then identifying as a federal project or federally assisted is equally difficult, not to mention keeping track of who is assigned where in any given time period is not easy to pull together. Then determining race and gender is another hurdle and another system. Gathering work hours is yet another hurdle. Sometimes the same employee may be working as a Superintendent or Foreman on one job and then could be a trades person on the next depending on staffing needs and availability.

One contractor reported that with thirty to forty federal jobs at any given time, they would estimate eighty hours a month and would have to hire an additional employee to comply with the CC-257 monthly reporting. Another reported that to develop a system to report would take an estimated minimum of one-hundred and eighty staff hours at a cost of eight to ten-thousand dollars. A third agreed that it would take multiple employees internally (HR and Payroll) costing many times more than the OFCCP's original estimate. All consulted agreed that agreed that a minimum of six months would be needed to create, test, and implement a process to respond to the CC-257 monthly. And, these were all larger and more sophisticated contractors with dedicated departments in place. AGC imagines it will be exponentially burdensome and difficult for smaller contractors – the bulk of AGC's membership – who do not have such systems in place, financial resources or the manpower to dedicate. AGC recommends that the OFCCP revisit its impact estimates and this data collection all together.

Conclusion

AGC reiterates its appreciation for the OFCCP's efforts and focus on protecting construction contractors. AGC also appreciates the opportunity to engage in the rulemaking process and looks forward to working with the Department as it continues to amend regulations that impact construction employers. If the association can aid in any way, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, reading "Claiborne S. Guy". The signature is fluid and cursive, with the first name "Claiborne" being the most prominent part.

Claiborne S. Guy
Director, Employment Policy & Practices